the brakeman had express authority to do so, and the act was shown not to have been within the course of his employment. The defendant requested the trial judge to rule that the evidence was not sufficient to warrant the jury in finding that it was within the scope of the freight brakeman's authority to eject the plaintiff from the train. *Held,* that refusal to so rule was error. *Harrington* v. *Boston and Maine R. R.* (Mass. 1913) 100 N. E. 606.

The question as to whether a freight brakeman has, by reason of his position, authority to remove trespassers has never before been passed upon in Massachusetts, the court in previous cases of this nature having decided upon other grounds, assuming that the brakeman was acting within the scope of his authority. *Planz* v. *Boston & Albany R. R.,* 157 Mass. 377, 17 L. R. A. 835; *Mugford* v. *Boston & Maine R. R.,* 173 Mass. 10, 52 N. E. 1078. In other jurisdictions the decisions on the question are in direct conflict, some favoring the rule that the brakeman has such implied authority: *Brevig* v. *Chicago, St. P. M. & O. R. Co.,* 64 Minn. 168, 66 N. W. 401; *Hoffman* v. *N. Y. C. & H. R. R.,* 87 N. Y. 25, 41 Am. Rep. 337; *Hayes* v. *Southern Ry.,* 141 N. C. 195, 53 S. E. 847; *Dixon* v. *N. P. R. R.,* 37 Wash. 310, 79 Pac. 943; *Smith* v. *L. & N. Ry.,* 95 Ky. 11, 23 S. W. 652; *Kansas City, F. S. & G. R. R.* v. *Kelly,* 36 Kans. 655, 14 Pac. 172. Other courts take the view that no such authority on the part of the brakeman can be implied. *Farber* v. *M. P. R. Co.,* 116 Mo. 81, 22 S. W. 631; *Randall* v. *Chicago & G. T. R. Co.,* 113 Mich. 115, 71 N. W. 450; *Corcoran* v. *Concord & M. R. Co.,* 56 Fed. 1014; *International & G. N. R. Co.* v. *Anderson,* 82 Tex. 516, 17 S. W. 1039; *Towanda Coal Co.* v. *Heeman,* 86 Pa. 418; *Marion* v. *C. R. I. & P. R. Co.,* 59 Ia. 428, 13 N. W. 415; *Chesapeake and O. R. Co.* v. *Anderson,* 93 Va. 650, 25 S. E. 947; *Northwestern Rd. Co.* v. *Hack,* 66 Ill. 238; *Alabama G. S. R. Co.* v. *Harris,* 71 Miss. 74; *Bess* v. *Chesapeake and Ohio R. Co.,* 35 W. Va. 492. The courts favoring the rule base their decisions on the theory that a brakeman in charge of a car is necessarily charged with the duty of protecting that particular property, and is therefore vested with an implied authority to remove trespassers therefrom; those disapproving the rule maintain that this theory is not applicable to the case of a freight train—that the mere fact of the conductor's having such authority excludes the idea of the brakeman's having it also.

SALES—ORAL CONTRACT FOR THE SALE OF GOODS TO BE MANUFACTURED BY A THIRD PARTY.—Defendant ordered an endless belt of certain dimensions from the plaintiffs, who sent the order to manufacturers in no way connected with them. On its completion the defendant refused to accept the belt; and contended that, there being no sufficient memorandum, the agreement was within the "goods, wares and merchandise" section of the Statute of Frauds. *Held,* that the contract was for work and materials, and not for the sale of goods, wares and merchandise. *Morse* v. *Canaswacta Knitting Co.* (1912), 139 N. Y. Supp. 634.

The English rule is invariable that if the agreement contemplates the ultimate delivery of a chattel it is a contract for the sale of goods, whether the goods are in existence when the contract is made or not. *Lee* v. *Griffin,*

1 B. & S. 272. If an article is to be made by the seller especially for the buyer and of a kind not readily marketable in the ordinary course of the seller's business, the contract is for work and materials, according to the familiar "Massachusetts" rule. Otherwise it is a contract for the sale of goods. *Goddard* v. *Binney,* 115 Mass. 450. When the seller is to make the goods, New York courts hold that since the goods are not in existence the contract is for work and materials. *Warren Chemical, etc. Co.* v. *Holbrook,* 118 N. Y. 586. But if a third party is to do the manufacturing, the American rules suddenly change. The Massachusetts court calls the deal a contract for the sale of goods, apparently without regard to the marketability of the things made. *Smalley* v. *Hamblin,* 170 Mass. 380. New York abandons as its test the existence or non-existence of the goods, and adopts that of their marketability. If they can be readily sold the contract is within the Statute of Frauds. *Juillard* v. *Trokie,* 124 N. Y. Supp. 121. If they can not, the contract is for work and materials, and so not within the Statute as held in the principal case. This view is also taken in *Bird* v. *Muhlinbrink,* 1 Rich (S. C.) 199. The American ruling seems to depart from the strict letter of a statute which itself makes no exceptions. The SALES ACT expressly provides that "if the goods are to be manufactured *by the seller* especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business," the 'goods, wares, and merchandise' section of the Statute of Frauds shall not apply. Probably in cases arising under the SALES ACT the courts will confine themselves to the strict letter of the exception provided.

SALES—RETENTION OF POSSESSION BY THE VENDOR AS FRAUD.—X sold his office furniture to the defendant, and later mortgaged it to the plaintiff, neither of whom took possession at the time of the respective transactions. There was no actual fraud involved. Later the defendant took the furniture, upon which the plaintiff replevied it. *Held,* that the defendant, having first taken possession, was the rightful owner of the goods. *Patchin* v. *Rowell,* (Conn. 1912) 85 Atl. 511.

In such cases the following question arises:—What is the effect of possession obtained by one of the rival claimants (1) in jurisdictions where retention of possession by the seller is not conclusive evidence of fraud, (2) in jurisdictions where such retention is conclusive evidence of fraud? Under the former rule, it has been held that the title of a purchaser who has not received the goods is inchoate, and the second purchaser or the attaching creditor who secures possession gets the title even though the prior purchaser has not had a reasonable time in which to get possession. *Lanfear* v. *Sumner,* 17 Mass. 109. But it has also been held that the title is not inchoate, and that in the absence of actual fraud the first purchaser is protected even though the second or the attaching creditor secures possession. *Meade* v. *Smith,* 16 Conn. 345; *Wilson* v. *Walrath,* 103 Minn. 412; *Hombeck* v. *Van Metre,* 9 Ohio 153; and the cases in all states where retention by the vendor is only *prima facie* evidence of fraud, excepting Massachusetts. Where retention by the vendor is conclusive evidence of fraud, the weight of